

**Imperato v Mount Sinai Med. Ctr.**

2010 NY Slip Op 33755(U)

April 30, 2010

Supreme Court, New York County

Docket Number: 110727/07

Judge: Joan B. Lobis

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5-4-10

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS  
Justice

PART 6

IMPERATO, MARYANNE,  
ETAL.

INDEX NO.

110727/07

MOTION DATE

3/2/10

MOTION SEQ. NO.

03

MOTION CAL. NO.

THE MOUNT SINAI MEDICAL  
CENTER, ETAL.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED

1-3

4, 5-10

6, 7, 18

**FILED**

MAY 05 2010

NEW YORK  
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 4/30/10

JBR  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

-----X  
**MARYANNE IMPERATO and CARLO IMPERATO**

Index No. 110727/07

**Plaintiffs,**

**-against-**

**Decision and Order**

**MOUNT SINAI MEDICAL CENTER and MICHAEL A.  
PALESE, M.D.**

**Defendants.**

-----X  
**JOAN B. LOBIS, J.S.C.:**

Plaintiffs move, by order to show cause, for an order vacating this court's prior order, dated November 24, 2009, which precluded plaintiffs from offering expert testimony at trial. Defendants cross-move for an order dismissing the case against defendants with prejudice. For the reasons stated below, the motion is granted and the cross-motion is denied.

This action sounding in medical malpractice was commenced by the filing of a summons and complaint in August 2007. The parties appeared for a preliminary conference in October 2007 and several compliance and status conferences thereafter. The note of issue was filed on or about March 30, 2009. Thereafter, defendants moved to vacate the note of issue. Defendants' motion was granted on default by a decision and order signed on June 29, 2009; a new note of issue was filed the next day. The parties appeared for a pre-trial conference on July 21, 2009 and the trial was scheduled for November 9, 2009, to begin jury selection. Plaintiffs and defendants were directed to exchange their expert disclosures no later than forty-five (45) days before trial (September 25, 2009) and thirty (30) days before trial (October 9, 2009), respectively. The parties appeared for a subsequent pre-trial conference followed by a telephone conference, during which plaintiffs sought

an adjournment because of the needs of their expert. To accommodate plaintiffs' request, the court adjourned the trial to December 7, 2009. The date by which plaintiffs and defendants needed to exchange their expert disclosure was extended to October 16, 2009 and November 6, 2009, respectively. After plaintiffs failed to exchange their expert disclosure by October 16, on or about October 23 defendants moved, by order to show cause, to compel plaintiffs to exchange their expert disclosures or preclude plaintiffs from using expert testimony at trial. On the return date of that application, the court permitted plaintiffs additional time to submit opposition papers and to serve their expert disclosure. After plaintiffs again defaulted, in a written decision signed on November 24, 2009, the court precluded plaintiffs from offering expert testimony at trial. Notwithstanding the preclusion order, defendants appeared before the court on the trial date; plaintiffs did not.

Plaintiffs' now ask the court to vacate the preclusion order. Their papers include a C.P.L.R. § 3101(d) response, which gives reasonable detail as to the matters about which their expert will testify. Plaintiffs' counsel, Ira. C. Podlofsky, Esq., submits an affidavit in support of his clients' motion in which he maintains that personal problems and inadequate staffing led him to neglect this action. He asks that his personal illness and lack of oversight of this matter provide an excuse for his default. Plaintiffs argue that the information in their 3101(d) notice establishes that their claims are meritorious. Defendants argue that plaintiffs' repeated failure to comply with court orders should not be overlooked; that plaintiffs have presented neither a reasonable excuse for the delay nor a meritorious cause of action; and that defendants' motion to dismiss must be granted if plaintiffs' preclusion order stands.

“New York’s public policy strongly favors litigating matters on the merits.” Lamar v. City of New York, 68 A.D.3d 449, 449 (1st Dep’t 2009) (citation omitted). As long as the previously defaulting movant has made a showing of reasonable excuse and meritorious claims, the case will continue. Rugieri v. Bannister, 7 N.Y.3d 742, 744 (2006). Here, the law office failure caused by plaintiffs’ counsel’s illness and the resulting lack of attention to the litigation shall—in an exercise of discretion—be considered a reasonable excuse for the failure to timely serve the 3101(d) notice. See Chelli v. Kelly Group, P.C., 63 A.D.3d 632, 633 (1st Dep’t 2009). The notice attached—although not signed by the expert—is sufficient to establish that the case has merit. There has been no sustained period of blatant disregard of court orders and defendants have not demonstrated prejudice. See Barbour v. Hospital for Special Surgery, 169 A.D.2d 385, 386 (1st Dep’t 1991). Upon the condition below being satisfied, the order of preclusion is vacated and the annexed C.P.L.R. § 3101(d) notice is deemed served. The cross-motion to dismiss is denied.


Finally, the vacatur of the preclusion order is conditioned upon plaintiff’s payment of \$100 in costs to defendants, within thirty (30) days of the date of this decision and order, in lieu of a sanction finding and payment to the Lawyers’ Fund for Client Protection.

The parties shall appear for a pre-trial conference on June 1, 2010 at 9:30 a.m.

This constitutes the decision and order of the court.

Date: April 30, 2010

**FILED**  
MAY 05 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

  
\_\_\_\_\_  
JOAN B. LOBIS, J.S.C.